

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROBERT WHARTON	:	CIVIL ACTION
	:	
Petitioner	:	No. 2:01-cv-06049-MSG
	:	
v.	:	CAPITAL CASE
	:	
TAMMY FERGUSON,	:	
Superintendent,	:	
	:	
Respondent	:	

**PENNSYLVANIA OFFICE OF ATTORNEY GENERAL’S MOTION
FOR EXTENSION OF TIME TO FILE BRIEF OF *AMICUS CURIAE***

AND NOW, comes the Pennsylvania Office of Attorney General, through undersigned counsel, who files this Motion for Extension of Time of File Brief of *Amicus Curiae* and, in support thereof, represents as follows:

1. On January 11, 2018, the United States Court of Appeals for the Third Circuit remanded this capital habeas matter to this Court, concluding that Petitioner is entitled to an evidentiary hearing with regard to his remaining penalty phase claim that trial counsel was ineffective for failing to present evidence of his adjustment in prison.

2. Prior to a status-of-counsel hearing before this Court, the Philadelphia District Attorney’s Office, which is representing the Commonwealth in this matter, notified this Court that it was conceding this penalty phase claim and requested that the Court grant habeas relief on the claim.

3. By Order dated March 4, 2019, this Court indicated that it could not make an independent evaluation of the merits of the penalty phase claim on the current record and permitted the parties to further brief the issue.

4. In accordance with this Court's Order, Petitioner submitted a brief and requested that the Court expand the record to include, *inter alia*, additional prison records.

5. The Philadelphia District Attorney's Office also submitted a brief, in which it indicated that Petitioner's remaining penalty phase claim was "not lacking in merit."

6. By Order dated May 7, 2019, this Court indicated that, in its brief, the Philadelphia District Attorney's Office "fails to indicate whether it did any investigation regarding Petitioner's adverse or negative adjustment to prison," fails to "comment on the expert report submitted by Petitioner, that expert's qualifications, or whether the District Attorney's Office has even considered consulting with its own expert," and appears to have "accepted the additional evidence offered by Petitioner at face value, without exploring whether contrary views may be viable and worth considering."

7. Under these circumstances, this Court found that the perspective by the Pennsylvania Office of Attorney General, as *amicus curiae*, would be helpful in

determining whether the Philadelphia District Attorney's Office's concession was proper.

8. This Court requested that the Office of Attorney General submit an *amicus* brief within forty-five days from the date of its Order (*i.e.*, by June 21, 2019), setting forth its position as to whether Petitioner is entitled to relief on his remaining penalty phase claim based on the current record or whether the record before the Court should be expanded.

9. The Office of Attorney General will be filing an *amicus* brief opposing penalty phase relief in this case without a complete review of available evidence.

10. However, the Office of Attorney General seeks additional time to complete its investigation and finalize its *amicus* brief.

11. Upon receiving the Court's May 7, 2019 Order, the Office of Attorney General has been diligently reviewing the available record, investigating Petitioner's claim of positive prison adjustment, and drafting its *amicus* brief. While it has received a substantial amount of documentation from the Department of Corrections and other sources, there are still documents and information that remain outstanding.

12. In addition, the Office of Attorney General is consulting with a mental health expert. The mental health expert has advised the Office of Attorney General that, in light of his schedule and caseload, he will need additional time to review records and generate his report.

13. Accordingly, to ensure that the Office of Attorney General has all the requisite information to assist it in providing its perspective to the Court, it respectfully requests an additional thirty-one days, or until July 22, 2019 (ordinarily, the request would be for thirty days, but July 21, 2019, is a Sunday), to file its *amicus* brief.

14. Undersigned counsel has contacted counsel of record in this matter and Attorney Van Wyk (on behalf of Petitioner) and Attorney George (on behalf of Respondent) have indicated that there is no objection to this extension request.

WHEREFORE, based on the above, the Office of Attorney General respectfully requests that this Honorable Court grant its Motion for Extension of Time to File Brief of *Amicus Curiae* and grant until July 22, 2019, for the filing of said brief.

By: /s/ James P. Barker
James P. Barker
Chief Deputy Attorney General
Pennsylvania Office of Attorney General
Criminal Law Division
Appeals and Legal Services Section
16th Floor—Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
jbarker@attorneygeneral.gov

Date: June 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused the foregoing Motion for Extension of Time to File Brief of *Amicus Curiae* to be served on the following persons via ECF or by first class mail:

Via ECF and/or First Class Mail

Victor J. Abreu, Esquire	Max Cooper Kaufman
Claudia Van Wyk, Esquire	Paul M. George
Federal Community Defender Office	Thomas W. Dolgenos
Capital Habeas Corpus Unit	District Attorney's Office
601 Walnut Street, Suite 545 West	3 South Penn Square
Philadelphia, PA 19106	Philadelphia, PA 19107

By: /s/ James P. Barker
James P. Barker
Chief Deputy Attorney General
Pennsylvania Office of Attorney General
Criminal Law Division
Appeals and Legal Services Section
16th Floor—Strawberry Square
Harrisburg, PA 17120
(717) 787-6348
jbarker@attorneygeneral.gov

Date: June 17, 2019